

Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 1326/04

Date heard: 2006\03\02

Date delivered: 2006-05-05

In the matter of:

SUZETTE IRENE ELMARIE NELSON

PLAINTIFF

and

**THE MINISTER OF SAFETY AND
SECURITY**

FIRST DEFENDANT

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

SECOND DEFENDANT

Coram: MAJIEDT J

JUDGMENT

MAJIEDT J:

1. The plaintiff sued the defendants for damages on the basis of the defendants' alleged negligence arising out of the defendants' failure to take steps to have the plaintiff's ex-husband, Dirk Nelson, declared unfit to possess a firearm. It is alleged that such failure is causally connected to the injuries sustained by the plaintiff when she was shot by the said Nelson with his licensed firearm.

2. The matter proceeded on the issue of liability only, such an order having been made in terms of Rule 33(4) at the request of the parties. No evidence was led and the parties agreed to a written set of facts which was placed before me, together with documents annexed thereto. For the sake of brevity the agreed facts can be summarised as follows:
 - 2.1 The police's standing orders of 1979 relating to the administration of the Arms and Ammunition Act, 75 of 1969 ("the Act") were applicable to the conduct of SAPS members during the period 1999 to 2002, i.e. the period relevant to the occurrences in the present matter.
 - 2.2 During January 1999 plaintiff's ex-husband ("Nelson") had applied for and was granted a firearm licence in respect of a 9mm Vektor pistol.
 - 2.3 Plaintiff and Nelson were married to each other on 17 November 1999.
 - 2.4 On 11 December 2000, plaintiff laid criminal charges against Nelson at the Sutherland police station under CAS 77/12/2000 ("the first criminal charge"). The charge on the docket indicated an alleged contravention of section 39 (1) (m) of the Act, viz. handling of a firearm while under the influence of intoxicating liquor. In her affidavit, plaintiff averred in substantiation of the charge that Nelson had punched her in the face. She also averred therein that Nelson had, while intoxicated, taken out his firearm and had mentioned to her that he would never allow her to be with anyone else but him and that he would rather kill both himself and the plaintiff.
 - 2.5 The policeman who attended to the plaintiff's complaint, Constable Hoffman, noted in his pocketbook that the plaintiff had visible injuries to her face, eye and chest. The relevant entry reads:

"Duidelike beserings aan haar gesig, oog en bors was sigbaar a.g.v. handelinge".
 - 2.6 On 11 December 2000, Constable Hoffman arrested Nelson on the aforementioned complaint and also seized his firearm, handing it in to the SAP13 store at the Sutherland police station.
 - 2.7 The plaintiff received treatment at the Sutherland hospital on the same day (i.e. 11/12/2000) for an injury to her left eye and scratches to her chest. The nurse who treated her, namely sister Nel, noted that the plaintiff presented as anxious, tense and fearful of Nelson. After treatment, the plaintiff was taken home by the police.

2.8 On the same day, the plaintiff applied to the magistrate at Sutherland for a protection order in terms of the Domestic Violence Act, 116 of 1998, under case number 8/2000. Plaintiff made reference in this application to previous physical violence and verbal abuse by Nelson. She also made mention of the following:

- (a) That Nelson had threatened her with a firearm and had threatened to kill her;
- (b) That she had been assaulted physically with resultant visible injuries;
- (c) That the application should be treated as urgent, given the fact of Nelson's threats to kill her;
- (d) **A specific request was made by her to the Magistrate that the police should seize Nelson's firearm and ammunition;**
- (e) A repeat averment was made that Nelson had stated that she was his alone and that he would rather kill both of them than to see her with someone else.

2.9 An interim protection order was granted against Nelson under case no 8/2000, as aforementioned, on 13 December 2000 ("the first protection order"). It was ordered *inter alia*, that a member of the SAPS at Sutherland seize Nelson's 9mm pistol and ammunition.

2.10 On 10 January 2001 plaintiff made application to the magistrate that the aforementioned first protection order be set aside, since Nelson had requested her forgiveness and had shown remorse for his conduct. Plaintiff stated further that she had been equally to blame for the incident, that Nelson had since acquired a job and that he was the family's sole breadwinner. The first protection order was consequently set aside on 14 February 2001.

2.11 On 13 May 2001, plaintiff laid another criminal charge, CAS 52/5/2001 against Nelson ("the second criminal charge"). The charge was one of assault with intent to do grievous bodily harm and she alleged that Nelson had *inter alia* punched her in the face. She attended the local hospital on that day where she received three stitches for a 3cm laceration to her left eyebrow and two stitches for a 1cm laceration to her lower lip. Her left eye was blue and swollen. She was treated by Dr. Malan.

2.12 On 20 June 2001 plaintiff testified in court on the first criminal charge (CAS 77/12/2000). She confirmed that she had laid the charge, but was unable to say why. She declared that it was untrue that Nelson had threatened her with a firearm. According to her she was drunk on the night in question and she had laid a false charge against Nelson out of anger and to take revenge against him. Following upon this evidence, Nelson was discharged at the end of the State's case on the same day. On that day the second criminal charge (CAS 52/5/2001) was withdrawn by the prosecutor at plaintiff's request. No withdrawal statement was, however, filed in the

docket – there is only a note in the investigation diary:
 “TT (teruggetrek) deur SA op versoek van klaagster”.

2.13 On 21 August 2001, plaintiff applied under case number 17/2001 to the magistrate at Sutherland for another protection order in terms of the Domestic Violence Act. It was recorded in this application that plaintiff’s daughter was emotionally affected by the family violence and that plaintiff and her daughter frequently had to flee from Nelson. The fact that plaintiff had laid two assault charges against Nelson was also recorded and mention was also made that Nelson had regularly assaulted plaintiff even before their marriage.

2.14 On 22 August 2001, an interim protection order was issued under case number 17/2001 against Nelson in favour of plaintiff (“the second protection order”). The return date was 12 September 2001. This second protection order was served on Nelson by Constable Hoffman on 17 September 2001.

2.15 On 5 September 2001, the station commander of the SAPS at Sutherland forwarded the docket in the first criminal charge(CAS 77/12/2000) to the area commissioner of the SAPS at Springbok for purposes of an enquiry in terms of section 11 of the Act. In his covering letter to the docket the station commander wrote:

“Aansoek: artikel 11 ondersoek: Sutherland MAS 77/12/2000-hantering van ‘n vuurwapen terwyl onder die invloed van drank (Wet 75/69 artikel 39(1)(m) “

1 *Aangeheg vind dossier vir beslissing ten opsigte van artikel 11 ondersoek en die aanstelling van die betrokke offisier.”*

2.16 On 2 October 2001 the area commissioner SAPS Springbok, returned the aforementioned docket with an accompanying letter to the station commander, SAPS Sutherland, stating therein that it was not necessary that an enquiry in terms of section 11 of the Act be held. The letter had the same heading as set forth in paragraph 2.15 above and stated that:

“1. Hiermee dossier terug aan u kantoor.

2 Dit is egter nie nodig om voort te gaan met ‘n Artikel 11 ondersoek nie,

aangesien die hof alreeds 'n beslissing omtrent die voorval gemaak het.

3. Sien Artikel 12- onbevoegdheid by skuldigbevinding om wapen te besit.”

2.17 On 10 October 2001 the second protection order was made final (the return date having been extended twice before then). In terms of that order, Nelson was *inter alia* prohibited from:

- threatening or assaulting plaintiff;
- entering their shared residence;
- entering the plaintiff's then temporary residence.

2.18 No enquiry in terms of section 11 of the Act as to the fitness of Nelson to be in possession of a firearm was ever held. A copy of the record of the proceedings under the Domestic Violence Act was never forwarded by the clerk of the magistrate's court, Sutherland, on the instructions of the magistrate, to the National commissioner of the SAPS for consideration in terms of section 11 of the Act.

2.19 On 26 October 2001 the SAPS at Sutherland handed back Nelson's firearm to him.

2.20 On 9 January 2002 plaintiff obtained a final divorce order against Nelson.

2.21 On 20 January 2002 Nelson entered the former shared residence, armed with his 9 mm pistol which had been returned to him by the police. He unlawfully fired shots at three persons on the premises. One shot hit one Johan Skiffers, wounding him. Two shots hit one Wimka Louw in the head, fatally wounding him. Three shots hit the plaintiff, two of which entered her head and the third of which entered her abdomen, lodging close to her spine.

2.22 Plaintiff was transported by ambulance to the hospital with the aforementioned gunshot wounds to her head and abdomen. She was in a critical condition upon admission. She was treated there before being transferred to the Eben Dönges Hospital at Worcester.

2.23 On the same day, 20 January 2002, Nelson shot and killed himself with his firearm.

3. To complete the background information, it is necessary to add the following to the abovementioned agreed set of facts:

3.1 One Sergeant du Toit had accompanied Constable Hoffman in attending to the plaintiff's complaint on 10 December 2000, alluded to above at par. 2.5. In his affidavit Du Toit confirmed in broad detail the facts set forth by Hoffman regarding plaintiff's complaint and her allegations against Nelson.

3.2 According to the exhibit register, 58/2000, Nelson's 9 mm pistol together with a 9 mm magazine and one 9 mm round were handed in at the Sutherland police station on 12/12/2000 under CAS 77/12/2000 (i.e. the first criminal charge).

3.3 Certain salient features of the plaintiff's affidavit on the first criminal charge require emphasis. She stated, *inter alia*, as follows:

“Dirk het toe by my kom sit waarop hy met my kom gesels het en aan my genoem het dat **hy ‘n mislukking in die lewe is en dat hy nie meer wil lewe nie.** Dirk het toe **sy vuurwapen geneem** en aan my genoem dat hy vir my vir niemand anders gun nie en dat **hy my maar liewer saam met hom sal doodmaak.** Ek het dit egter reggekry om die wapen van hom af te kry waarop ek die magasyn uitgehaal het en gesien dat daar net een rondte in dit was. Ek het toe die wapen met die magasyn in die kluis toegesluitDit is nie die eerste keer dat Dirk my aanrand nie. Vorige kere het hy my al geklap en my geskel maar **dit was nie so erg soos hierdie keer nie.**”(emphasis supplied)

3.4 The following entry dated 1/6/2001, appears in the investigation diary relating to the first criminal charge (the entry was presumably made by Const. Hoffman subsequent to Nelson's acquittal on this charge):

“OB, besk vrygespreek; klaagster getuig haar A1 verkl is leuens, besk was nie dronk en het nie die vuurwapen hanteer deur haar te dreig nie”.

Immediately thereafter, the following inscription appears:

“Nagesien:

i) Versend dossier na AK vir Artikel 11 o/soek”.

The docket was thus sent to the area commissioner at Springbok for a section 11 enquiry, **subsequent** to the plaintiff's recantation under oath of her sworn statement and the consequent acquittal of Nelson.

3.5 It is of some importance to record that, in applying for the setting aside of the first protection order, the plaintiff did not retract any of the allegations which she had made against Nelson (see par. 2.8 and 2.10 *supra*).

3.6 With regard to the confirmation of the second (interim) protection order on 10 October 2001, the presiding Magistrate recorded the proceedings by hand as follows:

“Beide partye teenwoordig. Kl deel mee sy is van plan om te skei, ten spyte van resp se pogings om te versoen; hy het geen beswaar dat bevel finaal gemaak word nie.

Beskermingsbevel per Vorm 6 en lasbrief per Vorm 8.

Gevolge van nie-nakoming van bevel aan resp verduidelik; dui aan hy verstaan.”

4. In *Minister of Safety and Security v van Duivenboden*_2002 (6) SA 431 (SCA), it was held that :

“A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.... Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.” (at 441F - 442A).

The Court held further that a negligent omission is

“regarded as unlawful when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the legal convictions of the community require that it should be regarded as unlawful” (at 442C).

At 444F - G the Court held that

“the legal convictions of the community must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution.”

5. The abovementioned passages from the *Van Duivenboden case*_are particularly apposite to the present case, since:

(a) the plaintiff’s case is based on an alleged negligent unlawful omission on the part of the defendants’ servants acting in the course and scope of their employment with the respective defendants; and

(b) the facts in that case is not dissimilar to those in the present case, particularly with regard to the first defendant’s position.

6. The defendants’ argument can be summarised as follows:-

6.1 On their behalf Mr Albertus has submitted that with regard to first defendant's legal duty, the pertinent question to be answered is whether, on the date that Nelson's firearm had been handed back to him, namely 26 October 2001, the first defendants' servants had in their possession information that reflected adversely upon Nelson's fitness to possess a firearm.

6.2 He submitted further that on the agreed facts, there was no such adverse information in the police's possession. In this regard Mr Albertus emphasized the fact of the plaintiff's perjury in the criminal trial on the first criminal charge. He described her recantation under oath of her sworn witness statement as being indicative not only of her untruthfulness, but also of her vindictiveness, i.e. that she was prepared to abuse legal process to achieve her own goals.

6.3 Consequently, so it is submitted, her sworn statement in the docket which was forwarded to the area commissioner, was lacking in both admissibility and probative value. There was therefore no statement under oath as required in section 11 of the Act before the area commissioner upon which he could reasonably have been expected to exercise his discretion in favour of holding a section 11 enquiry.

6.4 Mr Albertus also submitted that the information contained in the two protection order applications and in the second criminal charge were either unreliable (as hearsay or as a consequence of the plaintiff's perjury at the trial on the first criminal charge), or did not reflect adversely at all on Nelson's fitness to possess a firearm. In the circumstances, so it is submitted, the police cannot be faulted at all for not forwarding any other documentation over and above the docket in the first criminal charge to the area commissioner, since no reasonable person in the position of the police would have had reason to believe that the information in their possession reflected adversely upon Nelson's fitness to possess a firearm.

6.5 Regarding the area commissioner's position, Mr Albertus submitted that, on the information contained in the docket forwarded to him, the area commissioner could not have been impelled to entertain a belief as contemplated in section 11, which would have required him to hold a section 11 enquiry. It has been submitted further that, even if additional documentation had to be forwarded to the area commissioner by the police at Sutherland, it did not follow that the area commissioner in the exercise of his discretion would have held an enquiry.

This was so, given the facts of the matter (see paragraph 6.4 above). It was also submitted that even if an section 11 enquiry had been held, it is unlikely that the area commissioner would have declared Nelson unfit to possess a firearm, particularly if Nelson had been given an opportunity to state his case before the area commissioner.

6.6 With regard to the second defendant's position, Mr Albertus submitted that the order for seizure of Nelson's firearm, as ordered in the first protection order of 13 December 2000, had fallen away once the protection order had been set

aside on 14 February 2001 at the behest of the plaintiff. He also submitted that the provisions in section 9(2) of the Domestic Violence Act did not apply to Nelson's firearm in the present case, since that firearm had been seized under the provisions contained in the Criminal Procedure Act, 51 of 1977.

6.7 As a second arrow to his bow regarding the second defendant's position, Mr Albertus has submitted that the second defendant can only be held liable for acts performed by a magistrate in his or her official capacity as such in instances where the magistrate had acted *mala fide*; in this regard he referred to the well-known judgment of **May v Udwin** 1981 (1) SA 1(A).

6.8 The defendants have pleaded in the alternative that the plaintiff has been contributory negligent. In this regard Mr Albertus has submitted that, as a consequence of the plaintiff's recantation under oath of her sworn witness statement at the criminal trial, a section 11 enquiry had not been held. If she had not recanted, such an enquiry would in all probability have been held and the firearm would not have been returned to Nelson in case of a conviction. The withdrawal of the second criminal charge and the setting aside of the first protection order, both at plaintiff's instance and request, exacerbate matters further, so he submitted.

6.9 Finally, Mr Albertus sought to distinguish some of the decided cases from the present one on the facts. It is indeed to the case law which I now turn.

7. A convenient point of departure in examining the relevant case law is to firstly take cognizance of the applicable legislation.

7.1 Section 11(1) of the Act reads as follows:

“11 Declaration of person by commissioner to be unfit to possess arms

If the commissioner is of the opinion that on the ground of information contained in a statement made under oath, other than such a statement made by the person against whom action in terms of this section is contemplated, there is reason to believe that any person is a person-

- (a)
- (b) who has threatened or expressed the intention to kill or injure himself or any other person by means of an arm; or
- (c) whose possession of an arm is not in the interest of that person or any other person as a result of his mental condition, his inclination to violence, whether an arm was used in the violence or not, or his dependence on intoxicating liquor or a drug which has a narcotic effect; or
- (d) who, while in lawful possession of an arm, failed to take reasonable steps for the safekeeping of such arm.
- (e) ...

he may, by notice in writing delivered or tendered to such person by a policeman, call upon such person to appear before the commissioner at such time and place as may be specified in the notice, in order to advance reasons why such person shall not be declared unfit to possess any arm on any ground aforesaid so specified.”

7.2 Sections 9(1) and (2) of the Domestic Violence Act, 116 of 1998, provide that:

“(1) The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of a respondent, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4(1), that-

(a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or

(b) possession of such arm or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's-

(i) state of mind or mental condition;

(ii) inclination to violence; or

(iii) use of or dependence on intoxicating liquor or drugs.

(2) Any arm seized in terms of subsection (1) must be handed over to the holder of an office in the South African Police Service as contemplated in section 11(2) (b) of the Arms and Ammunition Act, 1969 (Act 75 of 1969), and the court must direct the clerk of the court to refer a copy of the record of the evidence concerned to the National commissioner of the South African Police Service for consideration in terms of section 11 of the Arms and Ammunition Act, 1969.”

8.1 In a case such as this the first fundamental principle which requires consideration is the constitutional duty of the organs of State.

In **Carmichele v Minister of Safety and Security** 2001 (4) SA 938 (CC) at 957 E-F the Court, per Ackermann et Goldstone JJ held that:

“ It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes rights (i.e. the rights contained in the Bill of Rights). In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.”

8.2 With particular reference to the State's constitutional duty to afford protection to

women, the Court held at 962 F:

“Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the State to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.”

At 964 E- 965 A, it was stated as follows:

“ South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.”

9.1 In *Van Eeden v Minister of Safety and Security 2003(1) SA 389 (SCA)* Vivier ADP stated as follows at 397 C-F:

“The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism (s 1(a) and (b) of the Constitution). In terms of s 12(1)(c) everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.

For present purposes it is not necessary to decide whether the right to be free from violence constitutes a separate entitlement or whether it is merely an explicit element of the right to freedom and security of the person. Freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms (*S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC)* para [13]). Section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the State to protect everyone from violent crime.”

At 398 C-F, the learned Judge stated:

“Under the South African Police Service Act 68 of 1995 the functions of the police include the maintenance of law and order and the prevention of crime. The police service is thus one of the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against the invasion of their fundamental rights by perpetrators of violent crime (*Minister of Law*

and *Order v Kadir* 1995 (1) SA 303 (A), at 321F and the Constitutional Court's judgment in *Carmichele* (para [62])).

[17] In *Van Duivenboden* the majority of this Court emphasised (para [20]) that the very existence of the State's constitutional duty to act in protection of the rights in the Bill of Rights necessarily implies the norm of public accountability, and pointed out that s 41(1) of the Constitution expressly provides that all spheres of government and all organs of State within such sphere must provide government which is not only effective, transparent and coherent, but also government which is accountable. The Court held (para [21]) that this norm must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case."

At 399 D-E, Vivier ADP stated that:

"An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and mandamus or interdict do not afford the victim of crime any relief at all. The only effective remedy is a private law delictual action for damages.

- 9.2 The **Van Eeden**-case, *supra*, concerned the police's liability for damages arising out of the plaintiff being raped by a known dangerous criminal and serial rapist who had escaped from police custody by fleeing through an unlocked security gate. In discussing the policy considerations which, as was the case in England at that time, may limit the police's delictual liability on the grounds of public interest, the learned Judge stated at 399 – 400 B:

"The considerations upon which the English Courts have based their approach are in any event not applicable to a case such as the present. This case does not concern the manner in which the police performed their functions relating to the detection of crime and the apprehension of criminals. These are matters in which public policy may well require that police should have a wide discretion. This case is concerned solely with the control that the police are required to exercise over a known dangerous criminal in police custody, in other words with the operational implementation of their own policies and not with the policy itself. The recognition of a legal duty in such circumstances will not disrupt the efficient functioning of the police, nor will it necessarily require additional resources. There is accordingly no reason to fear that it might inhibit the proper performance by the police of their primary functions or lead to defensive policing."

As is the case in **Van Eeden**, I am of the view that this case pertinently concerns the operational implementation of the police's own standing policy with regard to the administration of the Act.

10. I now turn to a consideration of the case law relating in particular to the police's

legal duty regarding the fitness of persons to possess a firearm.

10.1 in **Minister of Safety & Security v Van Duivenboden**, *supra*, the respondent had sued the appellant for damages for injuries sustained when he was shot by one Brooks. The respondent averred in his summons that the police acted negligently in failing to take steps to deprive Brooks of his licensed firearms, despite there being grounds to do so and that their negligence was the sole cause of him being shot by Brooks. On appeal the Court had to consider the legal duties imposed on the police by virtue of the provisions of section 11 of the Act, bearing in mind the duty of the State to protect the fundamental rights as provided for in sec. 7(2) of the Constitution, Act 108 of 1996. This consideration entailed primarily the police's failure to act on information which pointed to Brooks' unfitness to possess a firearm as set forth in section 11 of the Act.

10.2 Mr. Viljoen has submitted on behalf of the plaintiff that the following passages from the **Van Duivenboden**-case (per Nugent JA) are particularly apposite to the facts and circumstances of this case:

10.2.1 At 439 C:

“Long before the respondent was shot various police officers were in possession of information that reflected upon Brooks's fitness to be in possession of firearms. In some cases that information emanated from Dawn but in other cases members of the police had direct knowledge of the facts as a result of two incidents.”

10.2.2 At 441 B-C:

“Simply from the events that occurred on 27 September 1994 it was known to a number of police officers, more than a year before the respondent was shot, that while he was in a drunken state Brooks had threatened to shoot himself and any person who attempted to intervene, including the police. That by itself warranted Brooks being declared unfit to possess firearms for a period of not less than two years. All that was required for the requisite procedure to be commenced was for any one of the police officers to reduce that information to writing under oath and to forward the statement to the person responsible for holding such enquiries.”

10.2.3 At 449 G-I:

“There can be little doubt that, if the information that was known to the various police officers had been attested to under oath and furnished to the relevant person, an enquiry would have followed within a reasonable

time and, in my view, it must be assumed that the police officer who conducted the enquiry would have considered the matter rationally in the performance of the duties imposed by the statute. 49 Not only is there no reason to assume that a senior police officer would not have done so but that would also have accorded with what was required by law. 50 Brooks' conduct on the night in question fell squarely within the terms of s 11(1)(b) and there can be little doubt that he would have been declared unfit to possess firearms for there was simply no proper basis upon which to avoid doing so. In terms of s 11(4) that declaration would have operated for not less than two years, but the enquiring officer would have had a discretion in terms of s 11(5A) to suspend the operation of the declaration for a period not exceeding two years."

- 10.3 In **Minister of Safety and Security v De Lima 2005(5) SA 575 (SCA)**, the respondent had been shot and seriously wounded by one Dos Santos who had a valid firearm licence. Pursuant to this shooting incident the respondent sued the appellant for damages. On appeal the Court had to consider whether the Trial Court had been correct in upholding the respondent's contentions that the police had been negligent in recommending that a firearm licence be issued and in issuing such licence to Dos Santos, which negligence caused the respondent's injuries. Central to the determination on appeal as to whether the police had in fact been negligent, was the consideration of Dos Santos' reference in his application for a firearm licence that a criminal charge against him had been withdrawn. In emphasizing the need for the police to have ascertained how the criminal charge against Dos Santos came to be withdrawn, Cloete JA stated at 580 G-I that:

"The essential question was not whether Dos Santos had been convicted of a crime. It was whether Dos Santos was a suitable person to possess a firearm and, in considering that question, the circumstances under which Dos Santos came to be charged, and the circumstances under which the charge came to be withdrawn, obviously required clarification.

[5] So far as the charge is concerned, it was submitted on behalf of the appellant that Basson had acted reasonably inasmuch as only common assault was allegedly committed by Dos Santos. This argument misses the point. Of course a charge of, for example, murder would require more detailed enquiries. But the circumstances under which even a relatively minor assault was allegedly committed could very well indicate that the person concerned had a short temper, was easily provoked and quickly resorted to violence."

At 581 B-C the learned Judge stated that:

"In addition the fact that the charge was withdrawn should not have ended the enquiry. Any

policeman should know that a charge can be withdrawn in circumstances which do not indicate that the person charged is innocent (for example, pending further investigation or where the complainant has died or become untraceable). “

11. In my view the most important aspects which require consideration herein in determining whether the police’s failure to conduct a section 11 enquiry into Nelson’s fitness to possess a firearm constitutes a negligent omission, are the following:

- a) The plaintiff’s perjury at the trial on the first criminal charge and the resultant discharge of Nelson at the end of the State’s case.
 - b) The withdrawal of the second criminal charge by the prosecutor at the request of the Plaintiff.
 - c) The setting aside of the first protection order on the application of the plaintiff.
- I now deal with these three aspects *seriatim*.

12.1 I have already alluded to the plaintiff’s evidence at the trial in par. 2.12 above. Plaintiff’s recantation under oath must have come as a considerable surprise to the prosecutor and, more importantly, to sergeant Du Toit and Constable Hoffman, who had attended to the complaint on the first criminal charge. This recantation should undoubtedly have raised the suspicions of, at the very least, Du Toit and Hoffman. They had personally seen the plaintiff some 9 hours or so after she had allegedly been assaulted by Nelson who had also allegedly handled his firearm while under the influence of liquor. Hoffman had in fact noted in his pocketbook that he was able to observe visible injuries on the plaintiff’s chest, eye and face. In all likelihood, Du Toit must have observed these injuries, particularly those on plaintiff’s face and eye, as well although he has not recorded such observation anywhere. Moreover, Hoffman had transported the plaintiff to and from the hospital where she was treated for her injuries. Sister Nel’s clinical notes indicated that plaintiff had “*hou op linkeroog, skraapwonde linkerbors*”. In all the circumstances I am of the view that the plaintiff’s perjury at the trial, as an isolated fact, did not warrant a conclusion that there were no grounds to conduct a section 11 enquiry. I fail to understand why Hoffman did not attest to an affidavit setting out fully his knowledge of the matter (i.e. regarding the first criminal charge) and his own personal observations (regarding plaintiff’s visible injuries), which affidavit should have been included in the docket which was sent to the area commissioner. In any event, as I shall presently show, the docket as it was, contained sufficient information to warrant the holding of an enquiry into Nelson’s fitness to possess a firearm.

12.2 The mere withdrawal of the second criminal charge without anything further, is in my view not decisive at all. It should be borne in mind that no withdrawal statement had been obtained, from the plaintiff (*qua* complainant) as is the practice. There was consequently no information available as to the **reason/s** for plaintiff's request to have the second criminal charge against Nelson withdrawn. In the absence of such reason/s there was, unlike in the first criminal charge, no recorded recantation of plaintiff's allegations against Nelson regarding his assault on her. The *dictum* in the **De Lima**-case at 581 B-C (see par. 10.3 *supra*) regarding the withdrawal of a charge, is particularly apposite in this case. There was a crying need for an investigation into the circumstances surrounding such withdrawal. A perusal of the medical information in the matter would have revealed that the plaintiff had required three stitches to her left eyebrow and two stitches to the lower lip, as a consequence of the injuries sustained in the alleged assault on her by Nelson on this second criminal charge.

This, coupled with Nelson's history of violent conduct and his alleged unlawful handling of his firearm (i.e. the first criminal charge) should have alerted the authorities to Nelson's possible unfitness to possess a firearm.

12.3 The first protection order had been set aside at the plaintiff's request for the reasons advanced by her which I would describe as compassionate grounds. She clearly felt empathy for Nelson by reason of the fact that he had apologised to her, he had obtained employment and because he was the sole breadwinner of the household. He had also apparently accepted her child as his own.

The various averments regarding Nelson's assaults on her and his general violent conduct towards her were never withdrawn by the plaintiff, not even when she applied for the setting aside of the protection order.

I intend dealing with the second respondent's position later, but the police should in my view have taken into account the plaintiff's allegations in the first protection order application, notwithstanding it having been set aside. The facts emanating from that application should have been included in one detailed affidavit, perhaps by Const. Hoffman to collate all the relevant facts and information to be forwarded to the area commissioner.

13. As I have already indicated, the docket in the first criminal charge had been forwarded by the station commander, SAPS Sutherland, under a covering letter to the area commissioner, SAPS Springbok, for a decision on a section 11 enquiry. The covering letter is dated 5 September 2001. By that date the following had **already** occurred:

- a) The first criminal charge had been laid (on 11/12/2000).
- b) The plaintiff had been medically examined (on 10/12/2000) and visible injuries to her face, eye and chest had been noted by both Sister Nel and Const. Hoffman.
- c) Nelson's licensed firearm had been seized (on 11/11/2000).
- d) The first protection order had been issued (on 13/10/2000).
- e) The second criminal charge had been laid (13/05/2001).
- f) Plaintiff had been medically examined again (on 13/05/2001) pursuant to the second criminal charge and she had required stitches to close the wounds sustained in the alleged assault.
- f) Nelson had been discharged on the first criminal charge (on 20/06/2001) and the second criminal charge had been withdrawn on the same date.
- g) A (second) interim protection order had been issued against Nelson on plaintiff's application (on 22/08/2001).

The station commander's failure to include all the other relevant facts emanating from the abovementioned occurrences collated in an affidavit by, say, Hoffman, constitutes a negligent omission on the police's part, in my view (compare the *dictum* of Nugent JA in the **Van Duivenboden** case at 441 D-E). This negligent omission, coupled with the glaring negligent conduct of the area commissioner, which I will discuss next, is directly causally linked to plaintiff being shot by Nelson as I shall show in due course.

14.1 I have little doubt that the additional information, in particular the contents of the docket in the second criminal charge which included a medical form J88 which vividly demonstrated that the complainant had received stitches to her wounds immediately after the alleged assault, was of vital importance. Moreover, this second criminal charge was still pending at the time of the forwarding of the docket to the area commissioner and there was a (second) interim protection order in place against Nelson. In both of these, serious allegations of assault had been made against Nelson, which reflected adversely upon his fitness to possess a firearm.

14.2 Counsel for the plaintiff has during argument, quite correctly, laid much emphasis on Hoffman's role in this matter. Hoffman not only had personal knowledge of the plaintiff's injuries with regard to the first criminal charge which he had noted in his pocketbook, but he also:

- a) acted as investigating officer in both criminal cases;
 - b) had been aware that the plaintiff had applied on two occasions to the magistrate for protection orders against Nelson – it is clear from the papers before me that Hoffman was the police officer who had served **both** these interim protection orders on Nelson;
 - c) had been aware that, **subsequent** to Nelson’s discharge on the first criminal charge and the withdrawal of the second criminal charge (both of which occurred on 20/06/2001) the plaintiff had applied for the second protection order, because he (Hoffman) had served same on Nelson.
- 14.3 The collation of the above vitally important information would undoubtedly have gone a long way in persuading the area commissioner that a section 11 enquiry into Nelson’s fitness to possess a firearm is warranted.

15. In examining the area commissioner’s role, it is firstly abundantly clear that he was not apprised of all the relevant facts pertaining to the matter, as set forth hereinabove. Nonetheless, it is clear that the area commissioner has, on the (limited) information made available to him *vis-à-vis* the docket in the first criminal charge, completely misconceived the provisions of section 11 and the duties imposed on him by that section. In so doing, he has acted negligently in failing to institute a section 11 enquiry into Nelson’s fitness to possess a firearm.

16. I have quoted the area commissioner’s response regarding the possible holding of an enquiry in full at par. 2.16 above. There are two fundamental misdirections contained therein:

16.1 Firstly, the area commissioner completely misconceived the duties imposed upon him by section 11 in declaring that “it was not necessary to conduct a section 11 enquiry, since the court had already made a decision about the incident” (paraphrased). The court had in fact merely discharged Nelson at the end of the State’s case due to a lack of *prima facie* evidence against him. The court had not been seized with an enquiry into Nelson’s fitness to possess a firearm and consequently could not and did not make a decision thereon. This amounts to an astounding misconception on the part of the area commissioner regarding the role and duties of a magistrate at a criminal trial as opposed to that of the commissioner at a section 11 enquiry.

16.2 In the second place, the area commissioner’s reference to the provisions contained in section 12 of the Act is completely misplaced. It is quite sufficient to merely refer to the heading of section 12 in this regard: “*Unfitness, upon conviction, to possess arm*” (own emphasis). Nelson had not been convicted, on the contrary, he had been discharged. Section 12 finds no application at all in the instant case.

17. The glaring and material misdirections on the part of the area commissioner clearly constitute negligence in my view. If he had properly understood the duties imposed upon him by section 11, he would in all likelihood have instituted an enquiry, notwithstanding the plaintiff's recantation under oath at the criminal trial. At such a section 11 enquiry, a much fuller and more troubling picture of Nelson's conduct and his unfitness to possess a firearm would have emerged. It can be assumed that, in holding such an enquiry, the area commissioner "*would have considered the matter rationally in the performance of the duties imposed by the statute*" (per Nugent JA in **Van Duivenboden** at 449 G) and as is required by law (*ibid*). The area commissioner would be expected to exercise the discretion vested in him rationally and judicially.

18. I find it convenient to deal now with an aspect raised by Mr Albertus during argument. He submitted that it did not follow that Nelson would have been declared unfit to possess a firearm after a section 11 enquiry, particularly if Nelson had been granted an opportunity to state his case. I cannot see how Nelson could convincingly have persuaded the commissioner that the allegations against him were untrue, given all the objective evidence available, more particularly the medical evidence. To borrow from Nugent JA in **Van Duivenboden** at 450 B-C: firearm licences are not issued so that the holders thereof acquire licence to shoot innocent people, nor do firearms belong in the hands of drunks.

Nelson's conduct, as was the case with that of Brooks in **Van Duivenboden**, establishes a clear pattern of violent assaults, drunkenness, misuse of his firearm while intoxicated and a predisposition to violent threats against his spouse, the plaintiff. It is difficult to conceive, in such circumstances, how the commissioner could not have exercised his discretion against Nelson remaining in lawful possession of his firearm.

19.1 During argument much has been made of plaintiff's perjury at the criminal trial. I do not share the view that her perjury is indicative of her general untruthfulness and vindictiveness. Her recantation should have aroused the suspicions of, at the very least, Hoffman. As I have already shown, there were in any event other facts and circumstances beyond her perjury which warranted a section 11 enquiry.

19.2 It has also been submitted that her averments against Nelson amounted to hearsay, were therefore inadmissible and could not be taken into account by the area commissioner. A similar argument was advanced on appeal in **Van Duivenboden**. I respectfully align myself with the following *dictum* of Nugent JA on that point:

"The provisions of the section do not preclude hearsay but if that was indeed Hefer's concern she could surely have obtained confirmatory evidence from other police officers with more direct knowledge of the facts."

In the present case, Hoffman was ideally placed to verify the averments from plaintiff.

20. Mr. Albertus has sought to distinguish the cases relied upon by Counsel for the

plaintiff, from the present matter. Such distinction was sought to be drawn primarily on the basis that the information imparted to the authorities in the other cases were objectively unassailable and unequivocal, unlike the information in the present case. I have already dealt at length with the various criticisms levelled at the plaintiff as being an unreliable perjurer, liar and vengeful person. To summarise – in my view such criticism is overstated and unreasonably harsh of the plaintiff. Moreover, and in any event, there had been other, objective and reliable information which reflected adversely upon Nelson's fitness to possess a firearm, available to the police at that time.

21. Very little argument has been advanced on the causation issue. I am, however, in no doubt whatsoever, that the negligence of the first defendants' servants (both at Sutherland and the area commissioner at Springbok) is causally directly linked to the plaintiff being shot by Nelson. Had all relevant information been collated and forwarded to the area commissioner and/or had the latter properly and correctly construed the provisions of section 11, he would have conducted an enquiry into Nelson's fitness to possess a firearm and the conclusion would, on a preponderance of probabilities, have been that his firearm licence should be withdrawn.

22. In the premises and for the reasons set out above, the first defendant must be held vicariously liable for the injuries sustained by the plaintiff after having been shot by Nelson.

23. The second defendant's position is considerably different to that of the first defendant regarding the issue of liability. Two aspects require consideration herein:

- a) The legal duty imposed on a magistrate under section 9 of the Domestic Violence Act; and
- b) whether the second defendant can be held vicariously liable for the conduct of the magistrate/s who had presided in the domestic violence proceedings.

These two aspects will be discussed separately hereinafter.

24. In the first protection order application, the plaintiff had levelled complaints against Nelson that he:

- a) had punched her in the face while she was lying on the ground; and
- b) had, whilst holding his firearm, made mention to her that he would rather kill both of them than to see her with someone else; and
- c) had been under the influence of liquor during the events described in (a) and (b) above.

25. In applying for the setting aside of the first protection order, none of the abovementioned allegations against Nelson had been withdrawn by the plaintiff. Her application for rescission was clearly actuated by compassion and empathy for Nelson who, in her view, had apparently turned over a new leaf.

26. Part of the first protection order was to the effect that Nelson's firearm be seized – at this stage the firearm had already, however, been in the police's possession, it having been seized on the first criminal charge.

27. There was in my view sufficient information placed before the magistrate to trigger the provisions contained in section 9(1) and 9(2) of the Domestic Violence Act.

There was indeed an order issued under section 9(1), viz seizure of Nelson's firearm, but no action was taken under section 9(2), viz referral of the copy of the record of the evidence to the national commissioner of the SAPS for consideration of a section 11 enquiry.

A period of approximately one month had elapsed between the granting of the first protection order (on 11/12/2000) and the application for the setting aside thereof (on 10/01/2001). There is no indication whatsoever that any steps were taken under section 9(2) to refer the record to the commissioner. The setting aside order was made only on 14/02/2001 – the first protection order had accordingly been operative for a period of just over 2 months. No steps whatsoever were taken during this time to give effect to the provisions of section 9(2) which are couched in peremptory terms ("the magistrate **must** direct the clerk of the court").

The application itself had been brought on an urgent basis as the plaintiff had feared for her life and this was mentioned in her application. Moreover, she had specifically requested seizure of Nelson's firearm.

I am of the view that this failure on the part of the Magistrate to direct the clerk of the court to refer the record of the evidence to the commissioner for a consideration in terms of section 11 of the Act, constitutes negligence as set out in **Kruger v Coetzee 1966(2) SA 428 (A) at 430 E-F**.

28. Mr Albertus has submitted that plaintiff has failed to prove that the magistrate ought reasonably to have foreseen that his/her failure to issue such a directive for referral of the evidence, would give rise to Nelson shooting the plaintiff.

I do not agree. The plaintiff was clearly fearful of Nelson and **such fear related to his lawful possession of a firearm, hence her request that his firearm be seized**. One fails to understand how an order under section 9(1) could have been made and yet no order was made under section 9(2) in these circumstances. The magistrate must obviously have been satisfied that the jurisdictional facts under section 9(1) had been proved, hence the issuing of an order for seizure of the firearm. The provisions in section 9(2) follow logically on those contained in section 9(1) – once the jurisdictional facts exist and once an

order of seizure of the firearm is consequently made, the firearm must be handed over to the SAPS and a directive for the referral of the evidence to the commissioner must be made (under section 9(2)).

One of the jurisdictional facts enunciated in section 9(1) is that the Court must be satisfied on the evidence before it that:

“the respondent has threatened or expressed the intention to kill or injure himself or herself or any person in a domestic relationship

The magistrate must therefore have been aware that, *sans* an order in terms of section 9(2) and *sans* a section 11 enquiry, Nelson would remain in lawful possession of his firearm as no enquiry and withdrawal of his firearm licence would follow.

The consequences to the plaintiff of such a state of affairs ought indeed to have been reasonably foreseeable by the magistrate, given the plaintiff’s stated fear of Nelson and her request to have his firearm removed.

29.1 At 448 F-G of **Van Duivenboden**, reference was made to the danger of placing undue demands upon public functionaries and authorities in determining foreseeability of harm. It was pointed out that an enquiry has to be made as to whether a person is required to act at all in order to avoid reasonably foreseeable harm and, if so, what that person is required to do. The answer to this enquiry would depend upon what can reasonably be expected in the circumstances of a particular case – such an enquiry would ensure that undue demands are not placed upon public authorities and functionaries. In the course of this enquiry, cognisance must be taken concerning the public authority or functionary’s resources and the manner in which they have prioritised matters, in determining whether they had acted reasonably (*ibid*).

29.2 in this matter the magistrate, having taken the view that the provisions of section 9(1) had become operative (and consequently the provisions in section 9(2) as well), merely had to issue a directive to the clerk of the court to refer the record of the evidence to the commissioner. The task imposed on the clerk of the court is a simple administrative exercise – similar to the referral of records to a High Court in criminal reviews under section 303 of the Criminal Procedure Act, 51 of 1977. This is a routine administrative task undertaken regularly at all magistrate courts, even one as small as Sutherland, on an almost daily basis in criminal cases which are subject to automatic review.

Consequently, it cannot in my view be said that the peremptory requirements of section 9(2) impose an undue and onerous demand upon the magistrate and the clerk of the court – the former merely has to issue a directive and the latter simply has to refer a copy of the record of the evidence to the commissioner. How onerous or burdensome can that be?

29.3 In the premises therefore, I hold the view that it was reasonably foreseeable to

the magistrate that harm may ensue to the plaintiff if a section 11 enquiry into Nelson's fitness to possess a firearm was not held. A reasonable magistrate would have caused the necessary steps to be taken to have the matter referred to the commissioner for his consideration of a section 11 enquiry and the magistrate's failure to do so constitutes negligence in my view.

29.4 The second (interim) protection order was made final on October 10, 2001, i.e. some three months prior to the shooting incident in which Nelson killed one person and wounded two others, including the plaintiff. My findings regarding the magistrate's negligence in respect of the first protection order apply *mutatis mutandis* to the second protection order; in fact, the negligence in the latter instance may be of an even higher degree, given the fact that the second protection order was never set aside, but had in fact been made final. The magistrate's recordal of the proceedings where the second protection order had been confirmed, shows that:

- a) Nelson was present thereat; and
- b) he had no objection to the interim order being made final; and
- c) the consequences of non-compliance with the final order had been explained to him and he acknowledged that he understood same.

In these circumstances a referral of the matter to the commissioner in terms of section 9(2) was most certainly required. The application for this second protection order had contained similar allegations of repeated assaults by Nelson on the plaintiff.

30. A more perplexing question is the second aspect, namely the second defendant's vicarious liability for the magistrates' negligence aforesaid. Mr. Albertus has submitted that the magistrates had acted *bona fide* and within the course and scope of their duties as such in both instances. He has submitted that in these circumstances it is doubtful whether the second defendant can be held vicariously liable and has referred to **Van Rooyen & others v The State & others 2002(5) SA 246 (CC)**.

31. in **May v Udwin**, *supra*, the Appellate Division had held that a judicial officer is protected by qualified privilege in defamation matters. Such qualified privilege protection can only be forfeited where it is proved on a balance of probabilities that the judicial officer, in publishing defamatory statements in the course of executing his judicial functions, had acted *mala fide* and out of malice. In the course of discussing the qualified privilege afforded a magistrate, Joubert JA held that:

"Qualified privilege is founded on public policy ... This is especially so with the qualified privilege of a judicial officer: public interest in the due administration of justice requires that a judicial officer in the exercise of his judicial functions, should be able to speak his mind freely without fear of incurring liability for damages for defamation" (at

19 H).

- 32.** In **Van Rooyen & others v The State & others**, *supra*, the Constitutional Court affirmed the institutional independence of Magistrates Courts as laid down in section 165(2) of the Constitution. The Court (per Chaskalson CJ) held that:

“Implicit in this recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent” (at 269 F – 270 A).

Various aspects of judicial independence were considered by the Court having regard to magistrates’ security of tenure, financial security, and the like. The **Van Rooyen** case does not in my view, offer a direct answer to the question whether the second defendant should be held vicariously liable in circumstances where a magistrate, performing judicial functions in a *bona fide* manner, had acted negligently. The case is, however, of considerable assistance in another respect as I shall show in due course.

- 33.** Vicarious liability is generally speaking, premised on social policy with regard to what is fair and reasonable. It is tantamount to an expression of society’s legal convictions that victims of delictual conduct should be able to recover damages from someone who has the ability to compensate the victim of such delictual conduct.

See: **Mhlongo and another NO v Minister of Police 1978(2) SA 551 (A) at 567 H:**

“... in the ultimate analysis such vicarious responsibility was based upon considerations of social policy” (per Corbett JA).

- 34.1** In order to assess whether vicarious liability finds application, a twofold enquiry is required: firstly to ascertain whether or not the particular delictual conduct had occurred while the person in question was acting on behalf of another, or independently. In vicarious liability matters, the first issue is therefore whether there is some or other connection between the parties (*in casu* the magistrate/s and second defendant).
- 34.2** There is “*no uniform or universal principle that governs each and every case involving vicarious liability.....*” (per Smallberger JA in **Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and others 2001(2) SA 242 (SCA) at 258 D-E.**)

The classic connecting factor is an employment relationship. An important factor which is taken into consideration in determining whether such an employment relationship exists, is the aspect of control. That is not, however a conclusive factor *per se* (*ibid*). The current approach is to adopt a broader multi-faceted test which considers all relevant factors, including questions of policy and fairness, to determine vicarious liability;

See: **Midway Two Engineering and Construction Services v Transnet Bpk 1998(3) SA 17 (HHA) at 23 H-J.**

In the present case magistrates are given a considerable amount of discretion in the execution of their duties – in such instances the element of control provides little assistance as a criterion for the determination of vicarious liability. The position of the magistrate/s *in casu* is not dissimilar to, for example that of policemen (compare: **Minister van Polisie v Gamble 1979(4) SA 759 (A)**) and trustees (compare **Van der Berg v Coopers and Lybrand Trust, supra**).

See also, generally:

Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd 2001(1) SA 372 (SCA) at 378 B-G;

K v Minister of Safety and Security 2005(3) SA 179 (SCA) at 183 C.

34.3 In applying these legal principles to the present matter, the following aspects are germane:

- a) Magistrates are independent, as an arm of government, separate from the executive and legislature (see the **Van Rooyen** case, *supra*);
- b) Magistrates are placed under the political office of the second defendant in the sense that the second defendant is the political authority responsible for magistrates;
- c) The test is:

“...wie as ‘n kwessie van billikheid en beleid die nouste met die gevaarskeppende bedrywigheid gemoeid is” (per Nienaber JA in the **Midway Engineering** case, *supra* at 23 I);
- d) in this case, issues of fairness and, more importantly, policy considerations would find dominant application in the enquiry.

35. The most important factor in weighing up policy considerations and fairness in the present matter is the question of the limits of delictual liability, given the unique circumstances of this case regarding the negligent omissions

of the magistrate/s. The primary fear is that imposing delictual liability in these circumstances upon a magistrate might have a chilling effect. In this regard, such fears:

“... are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials”

per Ackerman *et* Goldstone JJ in the **Carmichele** case, *supra* at 960 A-B.

In assessing the legal duty owed by a prosecutor either to the public in general or to a particular member thereof, the Court in **Carmichele** cautioned that account should be taken of the pressures under which prosecutors work, particularly in the magistrates' courts (at 968 B). The same surely holds true for magistrates.

36. Ultimately, a decision one way or the other on this vexed question of the vicarious liability for the negligent omissions of the magistrate/s, would involve developing the common law, which is an inherent power afforded this Court, taking into account the interests of justice (section 173 of the Constitution). Where the common law is out of step with the spirit, purport and objects of the Bill of Rights, the courts have a constitutional obligation to develop the common law by correcting same. This is so, since section 39(2) of the Constitution holds that:

“... when developing the common law ... every court ... must promote the spirit, purport and objects of the Bill of Rights”.

37. The fundamental right of the plaintiff here is the right to security of the person, more particularly the right “*to be free from all forms of violence from either public or private sources*” (section 12(1)(c) of the Constitution). The magistracy, as part of the judiciary, forms an independent organ of the State, which is charged in section 7(2) of the Constitution with the obligation “*to respect, protect, promote and fulfill the rights in the Bill of Rights..*”

38.1 in **Hannah v Government of the Republic of Namibia 2000(4) SA 940** (Nm LC), the applicant, a Judge of the Namibian High Court, had launched an urgent application against the government for an order restraining the latter from unilaterally altering his conditions of employment as a Judge. The application was brought in the Namibian Labour Court. The Court was called upon to decide a point *in limine*, namely that it lacked jurisdiction to hear the case since a Judge is not an employee of the State.

38.2 In upholding the point *in limine*, Ngoepe AJ first examined the position of a Judge in Namibia in some detail, having regard to:

- a) A Judge's appointment for life by the President on recommendation of the Judicial Service Commission;
- b) the fact that a Judge may only be removed on the ground of mental incapacity or for gross misconduct under a stringent procedure;
- c) the fact that a Judge's salary is governed by legislation and that it may not be reduced;
- d) the independence of the judiciary being guaranteed by the Namibian Constitution.

38.3 Ngoepe AJ then examined the true nature of a Judge's duties, namely the exercise of judicial functions, which were to be exercised in terms of the Namibian Constitution in accordance with the Judge's oath of office. No supervision or control *vis-a-vis* the State exists, on the contrary, it is expressly prohibited by the Constitution (on the doctrine of the separation of powers). With reference to the Indian case of **Union of India v Pratibha Bonnerjea [1996] AIR SC 690**, Ngoepe AJ held that:

"I find the reasoning in the above judgment very persuasive. It is noteworthy that the constitutional position of a Judge in India is to a large extent the same as that of a Judge in this country: at least as regards appointment, security of tenure and judicial independence. It is interesting that, if a representative of the government were to defy a Judge's order, the Judge would have the power to commit such a person to prison for disobeying the order – 'master' being sent to prison by its own 'servant' for having disobeyed the 'servant'? Yet another consideration is the fact that the supposed employer does not have the power to dismiss the applicant at will; were the dismissal not to be in accordance with the Constitution, it would simply be *ultra vires* and of no force and effect. That is the extent to which the State (the employer?) may find itself powerless against a Judge." (at 945 B-D).

The learned Judge consequently held that a Judge is not an employee of the State.

39. The position with regard to a Judge in South Africa is, of course, almost identical to that of a Judge in Namibia, having regard to *inter alia* the provisions contained in sections 165, 174, 176 and 177 of the Constitution as well as the provisions contained in the Judges' Remuneration and Conditions of Employment Act, 47 of 2001.

40. The position of a magistrate is somewhat different to that of a Judge in Namibia or in South Africa. In the **Van Rooyen** case, Chaskalson CJ, writing for the Court, held that:

“In the result there are provisions of the Magistrates Act, the Magistrates’ Courts Act and the Regulations for Judicial Officers in the Lower Courts as presently formulated that fall short of what is required to ensure the institutional independence of magistrates’ courts. However, in the context of the protection given to magistrates’ courts and magistrates at an institutional level by the Constitution itself and by the other safeguards referred to in this judgment, the legislation viewed as a whole is consistent with the core values **of judicial independence**” (emphasis supplied);

at 336 C-D [par 269]

41. Having regard to the institutional independence of the magistracy and for public policy considerations, I am of the view that the second defendant ought not to be held vicariously liable for the magistrates’ negligent omissions in these circumstances. The magistrates exercised a considerable amount of discretion in conducting the domestic violence proceedings. No control whatsoever could be exercised over them by the second defendant, given the magistrates’ independence. Moreover, it would not serve the public interest in general and the interests of justice in particular to hold the second defendant vicariously liable in these circumstances. It would most certainly detract greatly from the fundamental doctrine of the separation of powers and from the independence of the magistracy as a component of the judiciary. In the premises and for this reason only, the plaintiff’s claim against the second defendant must fail.
42. A final issue for determination is the question of contributory negligence by the plaintiff, which was pleaded in the alternative by both defendants. Defendants aver that plaintiff acted negligently in:
 - a) testifying on 20 June 2001 that she had laid false charges against Nelson, thus resulting in his discharge on the first criminal charge;
 - b) requesting on 20 June 2001 that the second criminal charge be withdrawn against Nelson;
 - c) requesting the rescission of the first protection order, resulting in same being set aside on 14 February 2001.

Such negligence, it was averred, had resulted in the servants of the first defendant not initiating a section 11 enquiry where Nelson would have been declared unfit to possess a firearm. It was further averred that plaintiff ought to have foreseen that her negligence would cause Nelson to remain in possession of his firearm and that he could shoot her with it and in so doing she had failed

to avoid what would have appeared to a reasonable man to be a clear risk to life and limb.

43. Mr Albertus has submitted that in all the other cases (**Van Duivenboden, Van Eeden, De Lima, Carmichele**) the plaintiffs had been innocent victims. An apportionment of 70% liability was sought against the plaintiff.

44. I have already found that, notwithstanding plaintiff's recantation at the criminal trial and her requests to have the second criminal charge withdrawn and the first protection order rescinded, there were sufficient additional **objective** evidence available, in particular to Hoffman, to initiate a section 11 enquiry. The police's reliance on plaintiff's perjury and recantation was completely unreasonable in the circumstances. It is correct as Counsel for the plaintiff has submitted, that the plaintiff did not owe the defendants a duty of care in respect of the utterances made by her. It has now been firmly established in our law that the State is constitutionally obliged to afford its citizens protection from violence. In the present case the facts and circumstances, cumulatively viewed, demanded that the first defendant's servants fulfil not only their aforementioned constitutional duties, but also their statutory obligations, as set out in section 11 of the Act. To hold the plaintiff liable as a joint wrongdoer in these circumstances would greatly offend against one's sense of justice and is, in any event, not justifiable on the facts or on the law.

45. I issue the following order:

45.1 The first defendant is ordered to pay to the plaintiff such damages as she is able to prove for the injuries sustained by the plaintiff as a consequence of being shot by Dirk Nelson on 20 January 2002.

45.2 First defendant is ordered to pay plaintiff's costs.

45.3 Plaintiff's claim against the second defendant is dismissed with costs.

**SA MAJIEDT
JUDGE**

FOR THE PLAINTIFF : ADV HP VILJOEN SC and ADV AC WEBSTER
INSTRUCTED BY : ELLIOT MARIS WILMANS & HAY

FOR THE FIRST
AND SECOND DEFENDANTS : ADV MA ALBERTUS SC and ADV Z ELOFF
INSTRUCTED BY : TOWELL & GROENEWALD

DATE OF HEARING : 2006-02-27 and 2006-03-02
DATE OF JUDGEMENT : 2006-05-05